

**New York Telephone, a NYNEX Company and
George Fouhy. Case 2-CA-22915**

December 14, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On December 26, 1989, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision. The Respondent filed a response brief,¹ and the General Counsel filed a motion to strike the Respondent's response brief.²

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to rehire George Fouhy because he had filed a grievance. We find, contrary to the judge, that the Respondent has shown that it would have refused to rehire Fouhy even if he had not filed the grievance. We therefore find that the Respondent lawfully refused to rehire Fouhy, and we shall dismiss the complaint.³

Fouhy was employed by the Respondent for some 15 years. He resigned in November 1986 to pursue a career in alcoholism counseling. At the time he resigned, he underwent an exit interview with his immediate supervisor, Dennis Porucznik. On the exit interview form, Porucznik rated Fouhy satisfactory in work and attendance but poor in attitude, and marked him ineligible for rehire, stating that Fouhy had demonstrated an undesirable attitude toward his job over the past few years. When he was filling out the exit interview form, Porucznik consulted with Fouhy's second-line supervisor, Thomas Muliero, regarding the ratings Fouhy should receive. Muliero agreed with Porucznik that Fouhy should not be rehired.

¹ The Respondent contends that the General Counsel's brief is not, in fact, in support of the judge's decision, but an attempt to reargue the General Counsel's entire case, including the portions decided in the Respondent's favor (and to which the General Counsel did not file exceptions). The Respondent argues, therefore, that the Board should reject the General Counsel's brief as inappropriate. We find no merit to this contention.

² We find no merit in the General Counsel's motion to strike the Respondent's response brief, and we deny the motion. We also deny the General Counsel's alternative request for leave to file an answering brief, because we find that the General Counsel's brief in support of the judge's decision adequately sets forth the General Counsel's position with respect to all the issues raised in the Respondent's exceptions.

³ See *Wright Line*, 251 NLRB 1083 (1980), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In May 1988, Fouhy applied for reemployment with the Respondent, but was informed that he was ineligible for rehire because of his poor attitude. He contacted Muliero in June and asked for his job back. Muliero informed him that he had not been recommended for rehire because of his bad attitude. Muliero testified that he would have rehired Fouhy had it not been for Fouhy's attitude.

Muliero testified that four factors contributed to his decision that Fouhy should not be rehired:

(1) Fouhy's filing a grievance claiming "daily travel allowance" (DTA) payments for daily commuting expenses following his 1981 transfer from the Respondent's Manhattan office to Greenwich, Connecticut. Muliero testified that, in claiming DTA payments, Fouhy was claiming money he was not entitled to receive under the collective-bargaining agreement.⁴ Moreover, according to Muliero, the Respondent and the Union bent over backward to accommodate Fouhy's request for transfer (which was made on a hardship basis), and Fouhy then welshed on the agreement he had made not to seek those payments, thereby "biting the hand that fed him." It was the latter aspect of this episode, not that Fouhy filed a grievance in the attempt to claim DTA payments, that Muliero stated was an example of Fouhy's bad attitude.

(2) Fouhy's first resignation letter, submitted November 3, 1986, which stated, in relevant part:

My first ten years in the company were good. I had the opportunity to work with what I consider to be some of the best telephone people in the world. My last five years however, were spent working in Westchester. The goals of the management people in Westchester seem to have nothing to do with improving telephone service for the customer. They are an egotistical group concerned only with improving their own self image, and when their plans fail they have a habit of singling out subordinates to use as scapegoats, and then shifting responsibility for their own failures to them. I have been a scapegoat, I have been harassed, and I have been suspended for no reason by these people. It is for these reasons that I am forced to resign.

On receiving that letter, Muliero advised Fouhy that it was not the kind of letter to submit if Fouhy wanted to use the Respondent as a reference. Fouhy thereupon submitted a second letter, which stated only that he was leaving to pursue a different career.

(3) An incident on September 18, 1986,⁵ in which Fouhy left work for a medical appointment but did not

⁴ The Respondent contends that DTA payments are made only when an employee is transferred at the Respondent's behest, and that Fouhy was not entitled to receive such payments because he was transferred at his own request.

⁵ The judge stated that this incident occurred on September 26, 1986. Her error is inconsequential.

appear for the appointment until some 5-1/2 hours later, allegedly because his car broke down. He did not attempt to telephone the Respondent in the interim. Muliero did not believe the story Fouhy told him. Fouhy was suspended, initially for 30 days; he grieved the suspension, which was reduced to 10 days. He was also placed on "final warning," in which status he remained in November, when he resigned.

(4) Fouhy's past performance appraisals, which, together with other undocumented but firsthand observations of his attitude by Muliero and other supervisors, indicated to Muliero that Fouhy had a bad attitude.

The judge found that the General Counsel had established a *prima facie* case that the Respondent's refusal to rehire Fouhy was unlawful, because Muliero admitted that Fouhy's attempt to claim DTA payments on the basis of an entitlement established by the collective-bargaining agreement contributed to his opinion that Fouhy had a bad attitude.⁶ Assuming, as we do *arguendo*, that the judge was correct in this finding,⁷ the Respondent still may avoid a finding that it violated the Act by demonstrating by a preponderance of the evidence that it would have refused to rehire Fouhy even had he not made the contractual claim for DTA payments.⁸ We find, contrary to the judge, that the Respondent has carried its burden.

We find that Fouhy's first resignation letter, the September 1986 incident, and the numerous reports from supervisors cited in Muliero's testimony—considered *together*, as Muliero testified that he considered them—constitute ample reason for the Respondent to have formed the opinion that Fouhy's attitude toward his job was such as to render him undesirable for rehire.⁹ Thus, Fouhy's letter accused the Respondent's

managers (including, implicitly, Muliero and Porucznik) of being egotistical, concerned only with their own self-images rather than with providing good telephone service, and of shifting responsibility for their failures to "scapegoats" such as Fouhy himself. Fouhy also claimed in the letter that he had been "harassed" and that he had been suspended for "no reason." We find no reason to doubt Muliero's testimony that such a broad-brush verbal assault on the Respondent's management contributed to his opinion that Fouhy had a bad attitude. (We note that the letter does not reflect any concerted protest against working conditions.)

Similarly, we find no reason to doubt that the events of September 18, 1986, contributed to Muliero's low opinion of Fouhy. On that occasion, Fouhy was absent from work for some 5-1/2 hours, and made no attempt to inform the Respondent where he was or why he was missing. When he did attempt to explain his absence to Muliero, he gave Muliero a "cockamamie" story that Muliero simply did not believe. Although such an absence is considered a serious "work time violation" by the Respondent (warranting suspension for the first offense and termination for a second offense within 2 years), Fouhy complained in his resignation letter that he had been suspended for "no reason."¹⁰

In reaching these conclusions regarding the first resignation letter and the September 18 incident, we have noted the judge's heavy reliance on the Respondent's failure to adduce evidence that it had treated other former employees as it did Fouhy. We find that the judge's analysis places an undue burden of proof on the Respondent.

Concerning the resignation letter, the judge found that the Respondent had the burden of showing that the letter was, in fact, an indicator of Fouhy's poor attitude, and that it had not met that burden. (Presumably the judge applied the same burden to the September 18 incident, although she did not say so explicitly.) In so finding, the judge determined, in effect, that Muliero actually had not relied on the resignation letter (or, presumably, on the September 18 incident) at all in deciding that Fouhy had a bad attitude; she found that those reasons were pretextual. It is well established, of

⁶Muliero testified that he was not influenced by the fact that Fouhy filed a grievance claiming DTA payments. That, however, is beside the point. An employee who honestly and reasonably invokes his rights under a collective-bargaining agreement is engaged in protected concerted activity, whether or not the claim takes the form of a grievance. See, e.g., *North Vernon Forge*, 278 NLRB 708 (1986). It does not matter whether such a claim is meritorious, as long as it is reasonably invoked. *Howard Electric Co.*, 285 NLRB 911, 912 (1987), *enfd.* 873 F.2d 1287 (9th Cir. 1989).

⁷Although the Respondent contends that Fouhy reneged on his agreement not to file DTA claims, Fouhy testified that he never entered into any such agreement. He further testified that he understood the collective-bargaining agreement to provide for DTA payments to any employee who was transferred, even at the employee's own request. The judge did not resolve the testimonial discrepancy, and the contract is not in evidence. Accordingly, we cannot determine on this record whether Fouhy's claim for DTA payments was made reasonably and in good faith. For purposes of this decision, we shall assume that the claim was brought in good faith and that Fouhy's action in making the claim was protected.

⁸See *Wright Line* and *NLRB v. Transportation Management Corp.*, above, *fn.* 3.

⁹We adopt the judge's finding that the Respondent failed to demonstrate, as it sought to do, that it would have refused to rehire Fouhy in any event because he resigned while he was on "final warning" following the September 1986 incident. The Respondent based its contention on the testimony of John J. Kenny, its director of labor relations, who stated that it was "inconceivable" that an employee who resigned while on final warning would be rehired, because such an employee would be considered unsatisfactory. As the judge noted, however, Kenny also testified—in answer to a hypothetical question by the Respondent's counsel—that if such an individual were rehired, he

or she would continue on final warning. Thus, Kenny's testimony does not establish unequivocally that the Respondent has a firm policy against rehiring former employees who resign while on final warning. More important, Muliero, whose decision it was not to rehire Fouhy, testified that had it not been for Fouhy's bad attitude, Muliero would have rehired Fouhy. In the face of this admission by Muliero, we cannot find that the Respondent has proved by a preponderance of the evidence that Fouhy was ineligible for rehire simply because he resigned while on final warning. There is no reason, however, Muliero should not have relied in part on the events of September 18, which led to Fouhy's being placed on final warning, in determining that Fouhy had an undesirable attitude.

¹⁰Although Fouhy grieved the suspension, Muliero testified that the filing of that grievance played no part in his forming the opinion that Fouhy had a bad attitude. The judge found that none of the many grievances filed by Fouhy, except the one claiming DTA payments, had any bearing on the Respondent's decision not to rehire him.

course, that an employer's assertedly lawful reason for taking action against an employee will be found to be pretextual if it is shown that that reason either did not exist or actually was not relied on.¹¹ The judge, however, apparently placed on the Respondent the burden of demonstrating that its asserted reasons were *not* pretextual, rather than requiring the General Counsel to prove that they *were* pretextual. In this the judge went too far. We will not find the resignation letter and the September 18 episode (which seem perfectly reasonable grounds for concluding that Fouhy had a bad attitude) to be pretextual merely because of the absence of corroborating evidence.¹²

In addition, regarding the September 18 incident, the judge stated that the Respondent had not shown that other employees with similar violations on their records had been rated as having poor attitudes and had not been rehired.¹³ The judge thus apparently placed the burden on the Respondent to demonstrate that, because of the September 18 episode *alone*, it would not have rehired Fouhy. That, however, is not what Muliero said. He testified clearly that that episode was one of several factors—as he put it, “just another building block”—that influenced his opinion that Fouhy was an undesirable employee. Contrary to the judge, we shall not require the Respondent to prove a defense it never asserted.

Muliero also testified that he considered both written and oral accounts of several supervisors indicating Fouhy's attitude problem. Muliero stated that in foremen's meetings and in direct telephone conversations with foremen, he had been informed that Fouhy was difficult to work with because he was argumentative and uncooperative, threw up road blocks whenever he was asked to perform tasks, and was “just a general pain in the neck.” More specifically, Muliero testified that he had been told by Foreman Francis Rogers that Fouhy's lack of productivity had led to an unsatisfactory work evaluation, and that whenever Fouhy was asked to do something he was argumentative and questioned why he was being asked to do it and why it had to be done a certain way, instead of just performing the task. According to Muliero, Foreman Charles Peker

had complained that Fouhy had failed to follow instructions because he had not paid attention to them. Muliero also stated that Fouhy had induced another employee to call Peker at home at 2 or 3 a.m. on one occasion to clarify certain instructions, even though the instructions were clear.¹⁴ Muliero also cited an episode in which Fouhy accused Foreman Emil Oesterling of purposely withholding his tuition reimbursement check, which Oesterling had returned because it bore a different name and lacked a social security number that would have identified the proper payee.¹⁵ Muliero also cited Porucznik's statement that he had difficulty dealing with Fouhy because Fouhy was not happy with his job assignment and often had to be prodded to get his work done.¹⁶ Finally, Muliero cited the undisputed fact that Supervisor Ray Carroll had rated Fouhy's attitude unsatisfactory in 1984.¹⁷ We find that, in addition to his own personal observations of Fouhy, Muliero reasonably relied on those reports of other supervisors in determining that Fouhy's attitude was unsatisfactory.

In this regard, we disagree with the judge's analysis of the evidence concerning the supervisory reports. She discounted Muliero's reliance on the reports of other supervisors that Fouhy's attitude was poor because the supervisors' evaluations of Fouhy were mixed, Fouhy had not been warned about his attitude by anyone but Carroll, and the supervisors' written reports were generally satisfactory and did not state that Fouhy had an attitude problem.

We view the evidence differently. That the supervisors generally rated Fouhy's work acceptable is beside the point. The Respondent does not contend that Fouhy was denied reemployment because he was a poor worker. As Muliero admitted, it was only Fouhy's attitude that stood in the way of his returning to work for the Respondent. It is true that the great majority of the documentary evaluations of Fouhy were favorable, but nearly all those evaluations were “work evaluation records,” which appear to be assessments only of Fouhy's performance on specific jobs or tasks, and not of Fouhy as an employee. There is no place on those forms for an evaluation of Fouhy's attitude, and no discussion of his attitude is found on any of them. We therefore attach scant significance to the

¹¹ *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

¹² See, e.g., *M. Burstein & Co.*, 284 NLRB 718 (1987) (no violation where disparate treatment not shown); *Pacific Intermountain Express*, 250 NLRB 1451, 1454 (1980), *affd.* sub nom. *Desper v. NLRB*, 672 F.2d 893 (D.C. Cir. 1981) (the General Counsel failed to prove pretext by preponderance of evidence, where, inter alia, no evidence of disparate treatment); *NLRB v. United Sanitation Service*, 737 F.2d 936, 940 (11th Cir. 1984) (evidence of disparate treatment rebutted respondent's defense, proving it pretextual). See also *Wright Line*, in which the Board stated that the respondent's having departed from its usual practice by terminating the charging party contributed to the General Counsel's *prima facie* case. 251 NLRB at 1090.

¹³ Unlike the judge, we find little significance in the Respondent's failure to include on the exit interview form specific reasons for deeming Fouhy's attitude poor. The form provides little space for explanation, and thus evidently was not intended to contain a detailed discussion of the underlying reasons for the Respondent's evaluation of the employee.

¹⁴ Peker testified, but did not mention this event. Fouhy, however, did not deny that it had occurred.

¹⁵ Both Oesterling and Foreman Herb Mocbeichel corroborated Muliero's account of this event. Mocbeichel, in fact, testified that Fouhy had accused Oesterling of stealing his check. Fouhy did not testify about this episode.

¹⁶ Porucznik corroborated Muliero's generalized testimony by describing an occasion on which he had upbraided Fouhy for not working fast enough, and had asked Fouhy why he was trying to “screw” Porucznik and was not trying to do the job better. Fouhy replied that Porucznik should not take the matter personally, because Fouhy did that to everyone. Fouhy did not contradict this testimony.

¹⁷ Those supervisors also testified about other events that could be interpreted to indicate a bad attitude on the part of Fouhy. Muliero, however, did not rely on those events in explaining why Fouhy's attitude made him, in Muliero's opinion, unsuitable for rehire. Accordingly, we do not consider those events in evaluating the Respondent's *Wright Line* defense.

fact that most of the documents evaluating Fouhy's performance do not contain criticisms of his attitude.

Moreover, Muliero testified that he relied on unwritten as well as written observations of Fouhy's attitude. Those unwritten reports have been discussed above. The judge, however, ignored those accounts almost entirely, and concentrated instead on the supervisors' written reports (which, as we have explained, generally do not address the attitude issue one way or the other).

Had the Respondent *terminated* Fouhy because of his attitude, we might view with more concern the lack of documentation of the problem and the supervisors' general failure to warn Fouhy of what might happen to him if his attitude did not improve. In such a case, the Respondent's failure to apprise Fouhy of his precarious position, and to give him a chance to mend his ways, might be more significant. But Fouhy was not discharged; the Respondent apparently had decided that, at least for the time being, it could live with his poor attitude. However, when Fouhy voluntarily resigned, there remained little reason for the Respondent to inform him about the problem with his attitude, because it was unlikely he would return and, in any event, the Respondent would be in no position to observe changes (if any) in his attitude. On the basis of their previous experience with Fouhy's attitude, then, Muliero and Porucznik simply seized the opportunity to ensure that Fouhy could not return to work for the Respondent by marking him ineligible for rehire.¹⁸ In such circumstances, the Respondent's failure to warn Fouhy about his attitude is less indicative of an intent to discriminate.

On the basis of all the foregoing—the initial resignation letter, the September 18 incident, and the supervisors' reports to Muliero—we find, contrary to the judge, that the Respondent would have determined that Fouhy had a poor attitude, and would have refused to rehire him, even had he not filed the grievance claiming DTA payments.¹⁹ We therefore find that the Re-

spondent's refusal to rehire Fouhy was not unlawful, and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

ples that came to his mind. That event, then, evidently was not uppermost in Muliero's mind when he decided not to rehire Fouhy.

Ruth Weinreb and *David E. Leach III, Esqs.*, for the General Counsel.

Beverly Gross, Esq., of New York, New York, for the Respondent.

Alan E. Wolin, Esq. (Lecci, Wolin & Wolin), of Hicksville, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on February 23 and 24, and May 15, 1989. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, refused to rehire George Fouhy because of his union activities. Respondent denies the material allegations of the complaint and asserts that the matter is barred by Section 10(b).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with its principal office in New York, New York, is a public utility providing telephone services. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Communications Workers of America, Local 1103, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Credibility of the Witnesses*

I found that most of the witnesses were generally reliable. However, I observed that Respondent's witnesses tended to color their testimony somewhat to favor the conclusion desired by Respondent and that they were antagonistic to George Fouhy. I have taken this tendency into account in

¹⁸Chairman Stephens observes that, with regard to Fouhy, Muliero and Porucznik were somewhat like diners in a bad restaurant who, although they do not take the trouble to send back unsatisfactory food, nonetheless resolve not to eat there again.

¹⁹Although Muliero was not asked whether he would have rehired Fouhy had it not been for his claiming the DTA payments, we do not deem dispositive his failure to testify on this point.

Muliero testified that, when he was questioned by a Board agent during the investigation of this case, he was asked to give examples of Fouhy's poor attitude, and that Fouhy's claim for DTA payments was the last of several exam-

evaluating the testimony. I also observed that Fouhy was evasive, especially when he was confronted with contradictions or changes in his testimony, and found that Fouhy's testimony was inconsistent with the documentary evidence in some instances. I shall not rely on Fouhy's testimony when it is contradicted by other more reliable evidence.

B. Background

The evidence shows that George Fouhy was hired by Respondent in 1971 as a switching equipment technician. He worked in Manhattan maintaining central office telephone equipment until September 1981. At that time, in response to Fouhy's written request for a hardship transfer closer to home, Respondent transferred Fouhy first to Greenwich, Connecticut, and then to various locations in Westchester County, New York.¹ Fouhy was told that he was being given a temporary transfer and that if there were no problems, the transfer would be made permanent after 1 year. In fact, Fouhy continued to work in Westchester County until November 1986, when he resigned his position with Respondent in order to begin a career as an alcoholism counselor in a rehabilitation facility.

In May 1988, Fouhy filed an application for rehire with Respondent. Fouhy was informed that he would not be rehired because at the time of his exit interview in 1986, he had been marked "ineligible" for rehire due to "poor attitude." Fouhy called Area Operations Manager Thomas Muliero in June 1988, and said he wanted his job back. Muliero said Fouhy did not have a job with the Company; he had not been recommended for rehire because of his bad attitude. This was the only reason for ineligibility that Muliero cited. It is clear that Muliero had the authority to change Fouhy's attitude rating and determination of eligibility for rehire if he was so minded. Muliero testified that had it not been for Fouhy's bad attitude, he would have rehired Fouhy.

C. The Facts

1. Fouhy's exit interview and rating

Thomas Muliero, now an area operations manager for Respondent, was a foreman in Greenwich and in a number of locations in Westchester County from 1981 to 1985. At various times he had direct supervisory authority over Fouhy. In 1985, when he was promoted to his current position, he assumed second-line managerial responsibility over Fouhy.²

Muliero testified that although Fouhy did his job in a satisfactory manner, he had a bad attitude. At foremen's meetings, Muliero heard complaints that Fouhy was argumentative and uncooperative. According to Muliero, he counseled Fouhy to get along with his supervisors and to listen to criticism. In August 1986, according to Muliero, he saw Fouhy at his work station looking unhappy and not working. Muliero asked Fouhy what was wrong and Fouhy replied that he was agonizing over a career change. He was taking

courses in counseling. Muliero advised Fouhy to do something that would make him happy.

Muliero stated that when Fouhy resigned in November 1986, the exit interview was conducted by Fouhy's immediate supervisor, Dennis Porucznik. On the draft exit interview form, Porucznik had indicated that Fouhy was satisfactory in attendance and work, but that he was poor in attitude. Further, Porucznik had rated Fouhy ineligible for rehire. After the interview, when Porucznik consulted with Muliero over the ratings on the exit interview form, Muliero told Porucznik that he agreed with him and that Fouhy should not be rehired. Muliero and Porucznik gave as the reason for ineligibility for rehire that "[Fouhy] has demonstrated an undesirable attitude toward his job over the past few years which is possibly attributable to his indecision whether to stay in his present position or move on to another career." Muliero's affidavit given to a Board agent states that certain considerations went into his decision that Fouhy should not be rehired:

1. A grievance over DTA filed by Fouhy.
2. A September, 1986, incident.
3. Fouhy's initial resignation letter.
4. Fouhy's past performance appraisals taken together with other undocumented but first hand observations of his attitude.

Porucznik testified that he had been a craftsman at the Company and had spent a lot of time working side by side with Fouhy. Then, in 1986, Porucznik became a supervisor with authority over Fouhy. At the time of the hearing, Porucznik was working for IBM.

Porucznik stated that Fouhy created a lot of problems for a manager. He was negative toward management, negative toward his job, and he had a poor attitude toward the business. Fouhy often referred to certain supervisors as jerks and said they did not know how to manage the business.

Porucznik conducted the exit interview with Fouhy on November 6, 1986. He asked Fouhy the questions indicated on the form relating to Fouhy's experiences while working for Respondent. Fouhy told Porucznik, in response to the latter's questions, that most of the aspects of his employment had been satisfactory except advancement opportunities and supervision. He stated that improvement was needed in communication between craft and management.

Porucznik testified that when he filled out the exit interview form, he knew Fouhy was a shop steward and he was familiar with two grievances filed by Fouhy. One of these was the DTA grievance. According to Porucznik, these matters were not on his mind when he filled out the ratings on the exit interview.

From the discussion of the testimony of Muliero and Porucznik above, it is clear that Fouhy's job performance was satisfactory and played no part in Respondent's decision not to rehire Fouhy. Thus, I shall consider the reasons given by Muliero and Porucznik for their finding that Fouhy's attitude was poor and should preclude his rehiring. Muliero, who had the final authority to approve Porucznik's rating, detailed the four components of his decision about Fouhy's attitude. I shall discuss these components.

¹ Fouhy lived in Westchester County at that time. He was eager to work closer to home so that he could more easily attend Alcoholics Anonymous meetings after work.

² Muliero began his career with Respondent as a switchman. He was a union member and served as steward and then chief steward.

2. The letter of resignation

Porucznik testified that Fouhy gave him a letter of resignation from Respondent on November 3, 1986. The letter stated, in part:

My first ten years in the company were good. I had the opportunity to work with what I consider to be some of the best telephone people in the world. My last five years however, were spent working in Westchester. The goals of the management people in Westchester seem to have nothing to do with improving telephone service for the customer. They are an egotistical group concerned only with improving their own self image, and when their plans fail they have a habit of singling out subordinates to use as scapegoats, and then shifting responsibility for their own failure to them. I have been a scapegoat, I have been harassed, and I have been suspended for no reason by these people. It is for these reasons that I am forced to resign.

Since he was new to his supervisory position, Porucznik did not know what to do with the letter. He telephoned Muliero and read the letter to him. Muliero told Porucznik that he was happy that Fouhy had decided what he wanted to do.

Then, Muliero spoke to Fouhy by telephone. According to Muliero he told Fouhy that the letter was not a pleasant parting of the ways and that if he wanted to use the telephone company as a reference in the future this was not the kind of letter to submit. Muliero told Fouhy that he might be burning his bridges. According to Fouhy, Muliero told him that if he wanted to be recommended for rehire he would have to give the Company a more favorable letter. As described above, I have found that Muliero is a more reliable witness than Fouhy and I credit Muliero's version of the conversation. I find that Muliero told Fouhy that the letter was not good if Fouhy intended to use the Company as a recommendation and I find that Muliero did not mention rehire to Fouhy.

A few days after this incident, Fouhy gave Porucznik a second letter of resignation which stated simply that Fouhy was leaving the Company to pursue a different career.

3. The DTA grievance

The DTA matter related to Fouhy's transfer from New York City in 1981. Fouhy testified that a person who is transferred is usually given a daily travel allowance (DTA), for 1 month. He was not given any DTA for his transfer to Greenwich in 1981. In December 1982, Fouhy filed a grievance over his failure to receive DTA. He claimed that he was owed about \$11,000.³ Although the record is not clear on this point, it seems that the grievance was held in abeyance and then revived in 1984, when Fouhy requested DTA of \$25,000. The grievance was pursued by the Union to the third step where it was denied. The International Union did not seek arbitration of the matter.

Muliero testified that the filing of the DTA grievance showed that Fouhy was looking for something he was not entitled to. In Muliero's view, the Union and Respondent

bent the usual transfer rules to permit Fouhy to transfer on a hardship basis, and Fouhy reneged on the arrangement and tried to take advantage of the situation. Muliero saw this as an example of a bad attitude by Fouhy. Muliero stated that it was not the filing of the grievance that caused him to conclude Fouhy had a bad attitude, but the fact that Fouhy was asking for money to which he was not entitled.

4. The September 26, 1986 incident

Fouhy testified about the September 26, 1986 matter which caused Muliero to decide that he had a bad attitude. He had been out sick with back trouble and he called Muliero to ask to be scheduled for a medical appointment upon his return to work. On the appointed day of his return, Fouhy got to work at 7:30 a.m. and at about 8:15 a.m. he left in his own car for the 9 a.m. medical appointment. Fouhy claims that he was stuck on the road, that he walked to the main road where he found a truckdriver to help him jump start his car, and that before he went to the medical department he stopped for lunch. When Fouhy finally arrived at the medical department at 1:30 p.m., Muliero was there. Muliero wanted to know where he had been for 5-1/2 hours and he did not believe the story Fouhy told him. Eventually, Fouhy was suspended for 30 days for this incident and placed on final warning. Fouhy filed a grievance over the suspension. The penalty was reduced by the Respondent to a 10-day suspension and a final warning.

Muliero testified about this incident. Respondent found that Fouhy was AWOL and this was regarded as a serious violation. Fouhy did not call when his car broke down and he did not call from the diner where he had lunch. The Company did not believe his story about getting stuck on the road. Muliero testified that he was influenced in deciding that Fouhy had a bad attitude by this occurrence but not by the fact that Fouhy grieved the 30-day suspension.

John J. Kenny Jr., director of labor relations of Respondent's headquarters staff, testified that Fouhy was on a final warning because of the September 26 absence from duty for 5-1/2 hours. The applicable rules provide that for a first offense "work time violation" a long service employee may be given up to 30 days' suspension. Fouhy was originally given the full 30-day suspension by Muliero, but this was subsequently reduced to 10 days and a final warning. Kenny testified that an employee on final warning is ineligible for transfer or rehire. He then testified that if a person on final warning were rehired, he would continue on final warning after the rehire. Thus, it is clear that Respondent has not shown that it has any firm policy against rehiring employees on final warning status.

5. Past appraisals

Respondent introduced some testimony by former supervisors of Fouhy in an attempt to show that Fouhy's work was not satisfactory. However, it is clear that Muliero and Porucznik rated Fouhy's work satisfactory, and Muliero testified that he would have rehired Fouhy had it not been for his "poor attitude" rating.

The testimony of the former supervisors is also relevant to Respondent's rating of Fouhy's attitude.

Francis Rogers supervised Fouhy between spring and fall 1983. He testified that he had trouble with Fouhy relating to

³The parties did not specify the facts relating to the calculation of this amount.

low productivity and lack of attentiveness. On May 16, 1983, he wrote an unfavorable evaluation of Fouhy for working at an unacceptable pace for the 3 days he was assigned to a particular task. Fouhy expressed his resentment at being given a number of assignments he considered less than desirable and he stated that he was being harassed by the Company.⁴ Since Rogers' evaluation referred to "prior satisfactory evaluations," there must have been prior satisfactory evaluations by Rogers of Fouhy that were not introduced into evidence by Respondent.

Herbert Mocbeichel supervised Fouhy at various times between 1983 and 1986. Respondent called him to testify that he observed a shouting match between Fouhy and another foreman in 1983, that he observed a disagreement over a late tuition refund check, and that Fouhy questioned the way jobs were run at the Company. However, the only documents prepared by Mocbeichel relating to Fouhy show that he praised Fouhy for jobs well done in 1983 and 1986, and there is no indication that Mocbeichel ever warned or disciplined Fouhy for a poor or unsatisfactory attitude.

Emil Oesterling testified that he was a switchman and worked with Fouhy for a time. He believed that Fouhy was difficult to work with and was antagonistic in his method of handling matters that were brought to him as shop steward. Eventually, Oesterling became a foreman and supervised Fouhy for a short time. Although Oesterling testified that Fouhy was a slow worker, no documentary evidence was produced showing that Oesterling ever warned or disciplined Fouhy for a poor attitude or any other failing.

Raymond Carroll testified that he supervised Fouhy from January to November 1984. Carroll described an incident which resulted in his suspension of Fouhy. However, the suspension was not upheld because proof of Fouhy's fault was lacking. In addition, other employees had not been disciplined for similar occurrences. Carroll stated that another example of Fouhy's uncooperativeness arose when the Company requested that he furnish an emergency telephone number; however, this matter was resolved in a mutually acceptable manner. Carroll gave Fouhy an unsatisfactory attitude and conduct rating in July 1984; he mentioned a poor attitude and uncooperativeness. In November 1984, Carroll gave Fouhy an unsatisfactory rating, stating in his "remarks" that Fouhy had made progress since his last rating and that more progress was needed.

Charles Peker testified that he supervised Fouhy for a time before 1985. He wrote several favorable appraisals of Fouhy. He also recalled writing two unsatisfactory work evaluations. One of these Peker removed from Fouhy's file and tore up 1 month later when Fouhy's work improved; another one involved a call store problem that occurred while Fouhy was on duty. Respondent did not show that Peker had warned or disciplined Fouhy for a poor attitude.

Benjamin De Clemente was Fouhy's foreman and appraised him in January 1986. He rated Fouhy satisfactory in attitude and conduct and in his "remarks" stated that Fouhy was a pleasure to work with.

Finally, Muliero himself supervised Fouhy in 1981 and then again from late 1984 to mid-1985. Muliero did not tes-

tify that Fouhy was a problem to him as a supervisor nor that he warned Fouhy for a poor attitude during the times when he supervised him directly. His testimony indicates only that he told Fouhy to get along with other supervisors.

D. Discussion

It is clear that the General Counsel has met the burden of showing that Fouhy's protected activity was a significant factor in Respondent's decision not to rehire Fouhy. Muliero testified that of the four bases for his approval of the "ineligible" for rehire rating based on a "poor attitude," one was Fouhy's filing of the DTA grievance. Although Muliero sought to distinguish the filing of the grievance from the fact that Fouhy was asking for DTA money, there is in fact no distinction to be made. Fouhy was seeking to vindicate an asserted right to DTA by filing a grievance under the collective-bargaining agreement. It is irrelevant whether the grievance had any merit or whether it was in fact an attempt by Fouhy to obtain money to which he was not entitled. Fouhy's right to file the grievance is protected by the Act. See *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).⁵

The General Counsel having shown that Fouhy's filing of the DTA grievance was a motivating factor in causing Respondent to rate him ineligible for rehire, the Respondent must demonstrate by a preponderance of the evidence that it would not have rehired Fouhy even if he had not filed the grievance. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* as modified 622 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Thus, I turn to a review of the other factors cited by Muliero.

Muliero testified that Fouhy's first letter of resignation contributed to the finding of a poor attitude. The letter is bitter and expresses certain complaints, but by no means does it exceed the bounds of decency. Further, there is no evidence that the type of grouching expressed in the letter was unusual at the Company, had not been tolerated by Respondent, or had ever been a reason for a failure to rehire an employee in the past. Respondent has the burden of showing that the letter of resignation was in fact an indicium of a poor attitude in the prevailing environment at the Company, and it has not met that burden.

The September 26 incident resulted in a 10-day suspension and final warning being given to Fouhy. As discussed above, Respondent has not shown that it has a policy of refusing to rehire employees who resign on final warning. Significantly, Porucznik and Muliero did not include the September 26 matter in the exit interview discussion of Fouhy's bad attitude. That discussion, quoted above, refers to an "undesirable attitude" but gives no supporting specifics. Respondent did not show that employees with similar violations on their

⁴ Fouhy told various of his supervisors that he felt harassed at times. Apparently, these claims were related to his sensitivity as a recovering alcoholic. There is no indication that Fouhy ever related his claims of harassment to his activities as a union steward.

⁵ I am not convinced that Fouhy's activities as a shop steward had any bearing on Muliero's decision to rate him poor in attitude. Nor am I convinced that Fouhy's filing of grievances other than the DTA grievance were of any moment. The record shows that Fouhy did not file, on the average, more grievances than the other stewards. Although Fouhy claimed harassment, he related it to his status as a recovering alcoholic. Furthermore, Muliero candidly testified that he rated Fouhy poor in attitude because of his filing of the DTA grievance. It is thus unnecessary to dwell at length on Fouhy's other activities.

records have been rated poor in attitude and that it has refused to rehire them.

Finally, a review of the testimony of some of Fouhy's former supervisors shows that their views of his attitude was mixed. In 1986, De Clemente stated that Fouhy "was a pleasure to work with." Peker both praised and criticized Fouhy for his work, but he never wrote any criticisms of Fouhy's attitude. Carroll, in 1984, was the only foreman who ever rated Fouhy unsatisfactory for his attitude. Oesterling never criticized Fouhy for a poor attitude while he supervised him. Mocbeichel praised Fouhy for his work in 1983 and 1986 and he never warned Fouhy about his attitude. Rogers gave Fouhy both satisfactory and unsatisfactory evaluations in 1983, but he did not criticize Fouhy for his attitude. Porucznik testified that Fouhy had a bad attitude because he criticized management and he was negative. But Porucznik never warned Fouhy about this or gave him a negative appraisal for his attitude. The evidence presented by Respondent to bolster Muliero's testimony that supervisory reports convinced him that Fouhy had a poor attitude is thus not very strong. Only one supervisor ever warned Fouhy or gave him a poor appraisal for his attitude. The testimony shows that Fouhy got along with some supervisors and did not get along with others. He apparently got on well with Muliero. I find that Respondent has not shown that supervisory reports provide a basis for Muliero's belief that Fouhy had a bad attitude.

I conclude that Respondent has not shown that the other reasons given by Muliero for a rating of poor attitude were sufficient to have rendered Fouhy ineligible for rehire in the absence of the DTA grievance.⁶

Furthermore, Respondent did not show that it had ever refused to rehire other former employees who had been rated poor in attitude. There is no evidence from which I can conclude that Respondent's policies precluded it from rehiring

Fouhy because he received a poor attitude rating on the exit interview. Indeed, Respondent's policies provide for changes in the exit interview ratings under certain circumstances.

E. Respondent's 10(b) Defense

Respondent argues that it determined that it would not rehire Fouhy in November 1986, when Muliero and Porucznik rated Fouhy ineligible for hire. Respondent thus urges that Section 10(b) of the Act bars the instant proceeding. That position is without merit. The facts make it clear that Fouhy did not learn until June 1988, that Respondent deemed him ineligible for rehire and that it would not rehire him. The charge was filed on July 5, 1988, well within the period prescribed by the Act. *Pennsylvania Energy Corp.*, 274 NLRB 1153, 1155 (1985).

CONCLUSION OF LAW

By refusing to rehire George Fouhy because he filed a grievance, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily refused to rehire George Fouhy in June 1988, must make him whole for loss of earnings and other benefits, computed on a quarterly basis from the date of the refusal to rehire to date of proper offer of rehire, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Since the record does not permit a finding of the exact date of the refusal to rehire, this determination shall be made in the compliance stage of the proceeding.

[Recommended Order omitted from publication.]

⁶I note that Muliero did not testify that even if Fouhy had not filed the DTA grievance he would have rated his attitude poor and found him ineligible for rehire.